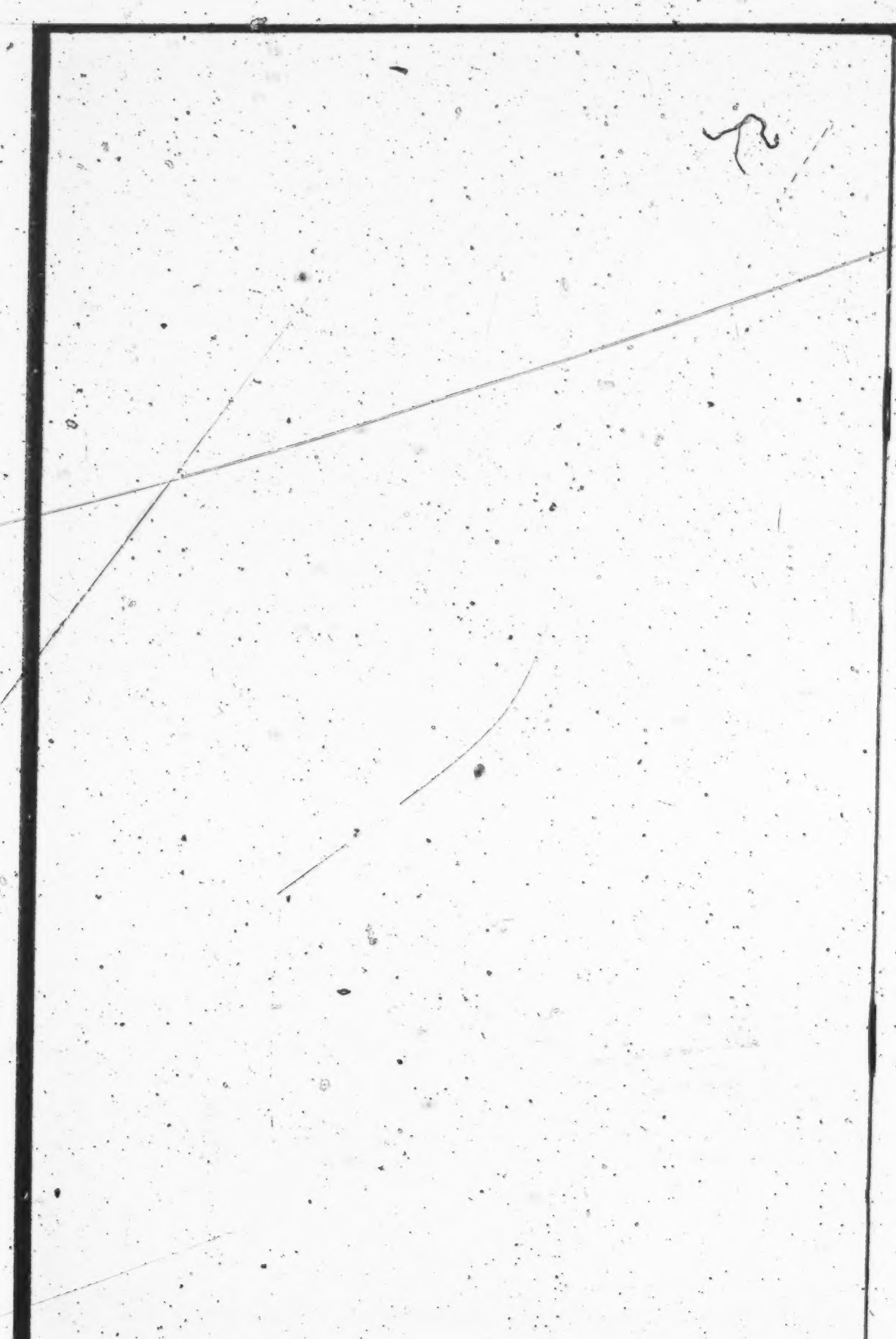

SUPREME COURT, U. S.

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No. 1269

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

On Appeal From the United States District Court for the Eastern District of Kentucky

PETITION FOR REHEARING

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On Appeal From the United States District Court for the Eastern District of Kentucky

PETITION FOR REHEARING

Pursuant to Rule 58(1) of the Revised Rules of this Court, appellant respectfully petitions for rehearing of the judgment of this Court (dated May 27, 1968) affirming *per curiam* the decision below.

REASONS FOR GRANTING REHEARING

The decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), offered, for the future, high promise of a reasonable accommodation of the rights of intervenors in antitrust cases. In less than eighteen months that promise has been seriously

diluted by a series of lower court decisions uniformly denying applications for intervention. If the decision below is permitted to stand, the law, in practical effect, will have reverted to its pre-*El Paso* status.

The court below, while paying lip service to the teaching of *El Paso* and permitting appellant to intervene, did not afford appellant any of the rights of a party (except the right of appeal). Appellant's situation therefore was little improved over that of the applicants who had been denied intervention in other cases: Despite *El Paso,* applicants for intervention in antitrust cases have not been allowed to meaningfully participate in and affect the outcome of antitrust cases.

This case provides an excellent vehicle for calling a halt to this backward trend. Intervention was granted, so the threshold question of the applicability of *El Paso* is not involved. The inadequacy of the consent decree appellant intervened to oppose is clear (J.S. 21-24). And, because of the overwhelming evidence that the challenged consolidation is in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2—the consolidated banks control over 90 percent of the relevant corporate trust market—the Court could reverse the decision below without inhibiting the Government in any way from settling close cases.[1]

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[1] In this connection it is significant that following the Court's *per curiam* affirmance in this case, the Department of Justice (on May 30, 1968) issued merger guidelines which emphasize that (¶ 2)—

> "[m]arket structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, i.e., by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes

CONCLUSION

The petition for rehearing should be granted, probable jurisdiction should be noted, and this Court's May 27, 1968, judgment of *per curiam* affirmance should be vacated.

Respectfully submitted,

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June 1968

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of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct of an economically undesirable nature."

The second sentence of that quotation accurately describes the market structure involved in this case, and only divestiture can effect an adequate remedial impact.

Certification

I certify that the petition for rehearing is presented in good faith and not for delay.

SIDNEY HARRIS